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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1949

No. 354

BEN SUGARMAN,
*Petitioner,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF AND MOTION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD.

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# In the Supreme Court
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OCTOBER TERM, 1949

No.

BEN SUGARMAN,
*Petitioner,*
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*

## PETITION OF BEN SUGARMAN FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA.

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Comes now Ben Sugarman and petitions this Honorable Court for a Writ of Certiorari directed to the District Court of Appeal of the State of California for the Third Appellate District, and for an Order to

the said District Court of Appeal, Third Appellate District, State of California, to certify the record to this Court and to reverse the decision of the Courts below for violation of rights asserted under the Fourteenth Amendment to the Constitution of the United States. The petitioner also asks leave to proceed upon the certified typewritten record. And in respect to these matters your petitioner, Ben Sugarman, respectfully shows as follows:

## OPINION BELOW.

Entitled

*People v. Burton, et al.*, 91 A.C.A. 817, 205 Pacific (2d) 1065.

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## JURISDICTION.

Jurisdiction is conferred by Section 2101 New Federal Judiciary Code, and by Rule 38½, Rules of the Supreme Court of the United States.

The decision of the District Court of Appeal, Third Appellate District, State of California, reviewing the trial proceedings in the Superior Court of San Joaquin County, was rendered May 6, 1949. Thereafter, and within the time allowed by law, a Petition for Rehearing was filed in said Court and denied, and within the time allowed by law, Petition was filed in the Supreme Court of California from the decision of the District Court of Appeal, said Supreme Court of California denied a hearing on said Petition on June 2, 1949. Thereafter, your petitioner telegraph-

ically requested an enlargement of time of this Honorable Court within which to file and docket the record and file the petition for certiorari and brief in support thereof, and said application was granted by Mr. Justice Black, who enlarged the time within which to file the said petition to September 29, 1949.

The judgment of the District Court of Appeal was also attacked by a petition for a Writ of Habeas Corpus, filed in the Supreme Court of the State of California, making as a part of said attack, the entire record in this case as an Exhibit therein, and said Writ of Habeas Corpus was denied by the Supreme Court of the State of California, Justices Jesse Carter and B. Rey Schauer voting for the hearing therein. Said denial was on July 14, 1949. It was stipulated by the Attorney General of California on said habeas corpus proceedings that the questions involved are fundamental and important.

A second fundamental question raised in this case is whether the petitioner, Ben Sugarman, was singled out for invidious treatment by the State of California in a small county, to-wit, San Joaquin, being compelled to stand trial before one jury on separate offenses separately stated, while seventy-five percent or more of the evidence going before this jury related to other defendants there and then being tried on other charges. Admittedly, these procedures have not generally been followed in California heretofore.

*People v. Davis,* 42 Cal. App. (2d) 70, 108 P. (2d) 85.

The question is raised for the first time in this case.

Public defenders in Los Angeles and San Francisco urged the California Supreme Court to consider these issues. Under the circumstances, the petitioner was singled out for treatment unlike that given to other persons charged with crimes in California. This constitutes a denial of the equal protection of the law.

*Louisiana v. Resweber,* 329 U.S. 459;
*Hysler v. Florida,* 315 U.S. 411, 423;
*Yick Wo v. Hopkins,* 118 U.S. 356, 30 L.Ed. 220;
*American Sugar Refining Co. v. Louisiana,* 179 U.S. 89, 92, 45 L.Ed. 102;
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*Burke v. New York,* 156 Fed. (2d) 791;
60 Harvard Law Review, 271.

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**CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.**

The essential portions of the Fourteenth Amendment to the Constitution of the United States, Section 1, provide as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 954 of the Penal Code of California provides as follows:

"An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count."

Section 1098 of the Penal Code of California provides as follows:

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial,

and any number of the others at different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section 1070 of this code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants."

Article I, Section 7 of the Constitution of the State of California provides as follows:

"the right of trial by jury shall be secured to all, and remain inviolate;"

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**SHORT STATEMENT OF THE FACTS.**

This case involves the constitutionality of Sections 954 and 1098 of the Penal Code of the State of California, as construed and applied in this case, and the denial of fair trial to the petitioner.

Particularly it involves the right of a State under the due process clause of the Fourteenth Amendment to the Constitution of the United States to try citizens en masse, where the indictment charges separate and distinct crimes not all provable against the same defendant, *before one and the same jury.* It involves the question of whether such procedure and proceedings provides an accused citizen with procedural due

process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It involves the important question of whether an individual may receive fair trial under such procedure and proceedings as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It also involves the issue of whether the appellant was singled out for invidious treatment by the State in this case.

In the habeas corpus attack before the Supreme Court, being forwarded separately to this Court, the Attorney General of the State of California, the highest non-judicial officer of the State, stipulated that the questions were of fundamental importance and ought to be decided on Federal grounds.

The petitioner, Ben Sugarman, was charged in Count I of an indictment returned in San Joaquin County, California, with *conspiracy* to commit grand theft of $15,550.59 from the Phoenix Insurance Co., on or about March 1, 1946. In Count II he was charged with grand theft of the same amount on the same date, and in Count IX he was charged with violation of section 556 of the Insurance Code on or about February 28, 1946.

In the same indictment two other defendants, Burton and Martin, were charged in Count III with conspiracy to commit another and different and separate grand theft of $12,827.06, on or about October 25, 1946. In Count IV Burton and Martin were charged with grand theft of this same amount from the same

company on the same date. In Count V Burton and Martin were charged with conspiracy to commit still another Grand Theft of $6,716.57 from the St. Paul Fire & Marine Insurance Co. In Count VI Burton and Martin were charged with Grand Theft of this amount. In Count VII Burton and Martin were charged with a conspiracy to commit Grand Theft of $2,029.61, from the Connecticut Insurance Co., on or about February 19, 1947. In Count VIII Burton and Martin were charged with Grand Theft of that amount from that company. The last two counts were alleged to have occurred more than one year after the counts in which petitioner was involved.

Thus it will be seen that while the petitioner Sugarman was charged with one conspiracy and an alleged theft growing out of the one item, the other two defendants were charged with separate crimes and separate thefts and separate conspiracies on different dates and against different persons, and these were all joined in one indictment.

Motions for severance on behalf of defendant Sugarman were denied as were motions for a separate trial and his demurrer to the indictment. After a long trial in which more than 75% of the evidence in the record pertained to the defendants Burton and Martin alone and not to the defendant Sugarman, Burton and Martin were also convicted on the separate charges separately stated before the same jury. The defendant Sugarman was also convicted by the same jury and all were sentenced to the penitentiary.

The evidence applicable to Burton and Martin was in many respects highly prejudicial. Motions for a new trial were made and denied, and an appeal followed. In the District Court of Appeal the appellant Sugarman contended that the effect of the action of the trial Courts denying his motion for a separate trial whereby he was forced to submit to a joint trial constituted a violation of due process of law in violation of Article I, Section 14, of the Constitution of the United States. The District Court of Appeal ruled upon the challenge of unconstitutionality of the proceedings, and held that due process under the United States Constitution had not been violated. On petition for hearing in the Supreme Court of California the issue was again raised as to the denial of due process and that Court denied a hearing, two Justices voting for the hearing, to-wit Justices Carter and Schauer.

In the meantime, a Writ of Habeas Corpus was filed in the Superior Court of the State of California attacking the constitutionality of Sections 954 and 1098 of the Penal Code of California as construed and applied in this case, submitting as the evidence on the writ a record in the trial of this case.

Challenge was also made upon the ground of denial of the equal protection of the laws which States are bound to apply and whether petitioner Sugarman was not singled out for invidious treatment in this case.

The Superior Court denied the writ on June 9, 1949. A new writ was filed in the District Court of Appeal, Third Appellate District, State of California,

on June 10, 1949, challenging the constitutionality of the statutes and proceedings, and said writ was denied by the District Court of Appeal on June 14, 1949.

Thereafter, a writ was filed in the Supreme Court of California, on July 1, 1949, and denied by that Court on July 14, 1949, Justices Carter and Schauer voting for the writ.

Thus, every remedy in the State of California has been exhausted, both directly from the judgment and by habeas corpus attack. As the habeas corpus attacks will also be brought up here to this Court, we are mentioning them herein.

In both the direct and the habeas corpus attacks a challenge was made to the procedure had herein as violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Also the constitutionality of Sections 954 and 1098 of the Penal Code of California as construed and applied was raised in the State Courts and the challenge there denied.

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**STAGES AT WHICH THE DUE PROCESS QUESTION WAS RAISED.**

On appeal from the judgment, the due process question was first raised in the District Court of Appeal, Third Appellate District, which denied the challenge. It was renewed on Rehearing in the said District Court of Appeal and therein denied. It was again renewed in the Supreme Court of California.

On habeas corpus it was first raised in the Superior Court, on June 9, 1949, and the challenges to the constitutionality of Sections 954 and 1098, as construed and applied, was denied under the Fourteenth Amendment to the Constitution of the United States. It was again raised in the District Court of Appeal, Third Appellate District, on habeas corpus on June 10, and denied on June 15, 1949. It was again raised in the Supreme Court of the State of California and on July 28, 1949 it was denied by that Court, Justices Jesse Carter and B. Rey Schauer voting for the issuance of the writ (34 A.C. 189).

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**QUESTIONS PRESENTED BY THIS WRIT.**

**I.**

WHETHER A STATE STATUTE AS CONSTRUED AND APPLIED, PERMITTING MASS TRIALS—THAT IS, ONE TRIAL OF DIFFERENT DEFENDANTS CHARGED WITH SEPARATE CONSPIRACIES AND SEPARATE SUBSTANTIVE OFFENSES ON DIFFERENT DATES AGAINST DIFFERENT PERSONS—TO BE TRIED ON ONE INDICTMENT BEFORE ONE JURY, DOES NOT OFFEND DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

**II.**

WHETHER THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA, ERRED IN HOLDING THAT SECTIONS 954 AND 1098 OF THE PENAL

CODE OF THE STATE OF CALIFORNIA, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, ARE NOT UNCONSTITUTIONAL, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN PERMITTING THE TRIAL EN MASSE OF DEFENDANTS ACCUSED OF DIFFERENT CONSPIRACIES AND DIFFERENT ALLEGED GRAND THEFTS AGAINST DIFFERENT PERSONS TO BE CONSOLIDATED IN ONE INDICTMENT AND TRIED BEFORE ONE JURY.

AND WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT SUCH A TRIAL AFFORDS PROCEDURAL DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

## III.

WHETHER THE DUE PROCESS OF LAW NORMALLY AFFORDED BY THE STATE STATUTES AND CONSTITUTIONAL PROVISIONS IN THE STATE OF CALIFORNIA HAVE BEEN SO CONSTRUED AND APPLIED IN THIS CASE AS TO DENY FAIR TRIAL AND THUS TO VIOLATE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

## IV.

WHETHER PETITIONER SUGARMAN, IN BEING SINGLED OUT IN THIS CASE FOR INVIDIOUS TREATMENT BY THE STATE OF CALIFORNIA, WAS DENIED THE EQUAL PROTECTION OF THE LAW.

The constitutionality of the challenged sections of the State of California, as construed and applied in this case, are Sections 954 and 1098 of the Penal Code

of the State of California. They are challenged both under the due process and equal protection clauses of the Fourteenth Amendment.

We have treated them jointly and assigned their application jointly, as well as separately, as their construction necessarily requires joint consideration.

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**REASONS FOR ALLOWING WRIT.**

This case involves fundamental questions of criminal law and procedure affecting all of the States of the United States.

The fundamental question in this case is: Whether, in the United States of America, there can constitutionally be a mass trial before the same jury of separate conspiracies, separately stated, and separate offenses against separate individuals, separately stated, all combined in one trial before the same jury; and, whether such procedure is so offensive to due process of law as to require reversal of the judgments below.

This Court has recently condemned the misuse of conspiracy charges.

*Krulewitch v. United States,* 93 L. Ed. 623.

It has also held that the trial of multiple conspiracies before the same jury is so prejudicial as to result in unfair trial and to require reversal.

*Kotteakos v. United States,* 328 U. S. 750, 90 L. Ed. 1557.

Such a procedure denies fair trial to an accused, guaranteed by the Fourteenth Amendment to the Constitution of the United States wherever it occurs.

*Re Oliver,* 333 U. S. 257.

The question is one of great importance in the administration of justice. It was recognized as such by various public defenders of the State of California, both of Los Angeles and of San Francisco, who urged a determination of these issues which may largely affect a great number of poor persons who could all be herded together and consolidated into one trial. It was also recognized by the Attorney General of California as of fundamental importance.

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**CASES BELIEVED TO SUSTAIN JURISDICTION.**

*Pointer v. United States,* 151 U. S. 396, 399, 404;

*Optner v. United States,* 13 Fed. (2d) 11, 12;

*Ashe v. United States,* 2 Fed. (2d) 735;

*Krulewitch v. United States,* 93 L. Ed. 623;

*Re Oliver,* 333 U. S. 257;

*Kotteakos v. United States,* 328 U. S. 750, 90 L. Ed. 1557;

*McElroy v. United States,* 164 U. S. 76, 41 L. Ed. 355;

*Carter v. Illinois,* 329 U. S. 173, 91 L. Ed. 172;

*Buchalter v. New York,* 319 U. S. 427, 87 L. Ed. 1492;

*Resweber v. Louisiana,* 329 U. S. 459;

*Lisenba v. California,* 314 U. S. 219, 86 L. Ed. 166;

*Mooney v. Holohan,* 294 U. S. 103, 79 L. Ed. 791;

*De Jonge v. Oregon,* 299 U. S. 353;

*Hebert v. Louisiana,* 272 U. S. 312.

Wherefore, for the violation of fundamental and fair procedure guaranteed by the Fourteenth Amendment to the Constitution of the United States, your petitioner respectfully prays that this Court issue its writ of certiorari to the Court below and that the judgments below be reversed.

Dated, Los Angeles, California,
September 21, 1949.

Respectfully submitted,
MORRIS LAVINE,
*Attorney for Petitioner.*

MAX WILLENS,
OF WILLENS AND BOSCOE,
*Of Counsel.*

# In the Supreme Court
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OCTOBER TERM, 1949

No.

BEN SUGARMAN,
*Petitioner,*
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### OPINION BELOW.

The opinion below is found in the case of *People of the State of California v. Don Burton, et al.*, 91 A.C.A. 817, 205 P. (2d) 1065.

### JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by Section 2101 New Federal Judiciary Code, and by Rule 38½, Rules of the Supreme Court of the United States.

The decision of the District Court of Appeal, Third Appellate District, State of California, was rendered May 6, 1949. Thereafter, and within the time allowed by law, a petition for rehearing was filed in said Court and denied, and within the time allowed by law, petition was filed in the Supreme Court from the decision of the District Court of Appeal, said Supreme Court of California denied a hearing on said petition on June 2, 1949. Thereafter your petitioner telegraphically requested an enlargement of time of this Honorable Court within which to file and docket the record and file the petition for certiorari and brief in support thereof, and said application was granted by Mr. Justice Black, who enlarged the time within which to file the said petition to September 29, 1949.

The judgment of the District Court of Appeal was also attacked by a petition for a writ of habeas corpus filed in the Supreme Court of the State of California, making as a part of said attack, the entire record in this case as an exhibit therein, and said writ of habeas corpus was denied by the Supreme Court of the State of California, Justices Jesse Carter and B. Rey Schauer voting for the hearing therein. Said denial was on July 14, 1949.

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**STATUTES.**

The statutes are set out in the petition ante.

## SUMMARY STATEMENT OF THE FACTS AND THE ISSUES INVOLVED.

On February 2, 1946, at approximately 3:30 o'clock in the afternoon a fire broke out at Burton's Shoe Salon, in Stockton, California, in the basement of the Burton Building in Stockton.

George Watrous, agent in Sacramento for the Phoenix Assurance Company, referred the adjustment of the loss to the defendant Frank Martin, not a petitioner here.

On February 4, 1946, Martin called upon Munro English, assistant manager of the Phoenix Assurance Company in San Francisco and received confirmation of his employment, and also authorization to employ the firm of Sugarman Brothers, a copartnership, of which Harry Sugarman and the appellant, Ben Sugarman, are partners, to advise with respect to taking over the stock of merchandise for salvage purposes.

Burton carried his fire and other insurance with George Watrous, whose offices were located in Sacramento. On February 3, 1946, Watrous, upon learning of the fire, requested Frank Martin, an insurance adjuster with offices in the City of Sacramento, to investigate the fire and the possible loss.

Mr. Burton, the insured, carried insurance on the stock of merchandise at the store in Stockton, California with the Phoenix Assurance Company; on the furniture, furnishings and fixtures, he carried it with the St. Paul Fire and Marine Insurance Company and on the building, with the Phoenix Assurance Com-

pany, and use and occupancy insurance with the Connecticut Fire Insurance Company. The following day the appellant was employed for the single purpose of advising whether the stock of merchandise should be taken over by the insurance company for salvage purposes.

At that time, and for many years prior thereto, appellant had been engaged in the salvage business in the City of San Francisco, and was an experienced and recognized expert on the matters relating to salvage. The record shows that all three of the defendants were men of previous good character and impeccable reputations. Each of the witnesses testified during the trial and no evidence attacking the previous reputations of good character of any of the defendants was offered by the State.

After the appellant made three trips to Stockton for the purpose of inspecting the stock of merchandise, he reported to Martin against taking the stock of merchandise over by the insurance company for salvage purposes. He estimated the amount which could be received for the merchandise as salvage. He then, at the request of Martin, estimated the amount of loss which would be thereby occasioned. This he did by subtracting the estimated salvage value from the inventory cost of the stock. Appellant had no further connections with the matter thereafter.

Martin adopted the figures of loss which appellant had utilized for the purposes of determining the salvage value of the merchandise and securing the execu-

tion of proofs of loss by Burton and reported the loss accordingly. The Phoenix Assurance Company immediately paid to Burton the loss so reported amounting to $15,550.59.

As a result of this single and lone transaction, the appellant was charged in the first two counts of the indictment jointly with Burton and Martin of the crime of conspiracy to commit grand theft and with grand theft of the same amount and in the ninth count with violation of the insurance code.

In the same indictment defendants Burton and Martin were charged with different conspiracies, with different allegations of grand theft against different alleged victims. Each of these others were alleged to have occurred on different dates long after the counts involving petitioner. The only common element, or a single spoke in the wheel, that connected them at all if it can be regarded as such was that in each case it was charged that the results of the same fire had been misrepresented. However, there were different losses against different alleged victims, and under different circumstances and the alleged misrepresentations were not in fact the same.

Motions were timely made in advance of trial to sever the trials. These motions were denied. The appellant Sugarman was forced to stand trial with the other two defendants. Seventy-five per cent of the evidence, some of a very prejudicial nature, related solely to the other two defendants and the other charges alleged in the indictment and was in no way connected with this appellant.

On appeal, in the District Court of Appeal, appellant contended that such procedure was violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and denied him fair trial as guaranteed by that amendment. A petition for hearing in the Supreme Court was denied June 2, 1949 (33 Adv. Cal. 889), two justices of that Court, Justices Carter and Schauer, voting for a hearing.

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**THE QUESTIONS PRESENTED BY THIS WRIT AND SPECIFICATIONS OF ASSIGNED ERROR.**

I.

THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT, STATE OF CALIFORNIA, ERRED IN HOLDING, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, THAT SECTIONS 954 AND 1098 OF THE PENAL CODE OF THE STATE OF CALIFORNIA PERMIT THE TRIAL EN MASSE OF DEFENDANTS ACCUSED OF DIFFERENT CONSPIRACIES AND DIFFERENT ALLEGED GRAND THEFTS COMMITTED AGAINST DIFFERENT PERSONS, IN ONE INDICTMENT AND TRIED BEFORE ONE JURY.

II.

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THIS CONSTITUTES A FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION.

III.

THE QUESTIONS INVOLVED IN THIS CASE ARE FUNDAMENTAL ON THE ISSUE OF FAIR TRIAL PROCEDURE GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

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## I.

**THE DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT OF THE STATE OF CALIFORNIA, ERRED IN HOLDING, INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE, THAT SECTIONS 954 AND 1098 OF THE PENAL CODE OF THE STATE OF CALIFORNIA, PERMITTING THE TRIAL EN MASSE OF DEFENDANTS SEPARATELY CHARGED AND SEPARATELY ACCUSED AS TO DIFFERENT CONSPIRACIES AND DIFFERENT ALLEGED GRAND THEFTS ALLEGEDLY COMMITTED AGAINST DIFFERENT PERSONS, ALL CONSOLIDATED IN ONE INDICTMENT AND TRIED BEFORE ONE JURY, DOES NOT DENY DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.**

It is highly important that this Court grant a hearing to determine fundamental issues of criminal law involving due process within the United States for the guidance and government of the various States of the United States. The Attorney General of California, being the highest non-judicial officer of the State, recognized the importance of this issue, as have the various public defenders in the State of California.

The fundamental question in this case is whether a State may under the due process clause of the Fourteenth Amendment adopt such unfair procedure as to result in unfair trial.

As Mr. Justice Roberts says in *Snyder v. Massachusetts*, 291 U.S. 97 at 137, the Court said:

> "A distinction has always been observed in the meaning of due process as affecting property

> rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is inflicted and the substantial rights of the citizen are not infringed; the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. **Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just.**"

And, in that case, the Court further stated:

> "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept * * * What is fair in one set of circumstances may be an act of tyranny in others."

How, then, can any defendant accused of one conspiracy receive a fair trial, if in the same trial two other defendants are separately charged with separate and distinct crimes, on separate and distinct dates, and all brought before one and the same jury? This is mass trial, before a jury of laymen. It may go in Europe but not in the United States under an ordered concept of justice. And, while this case only involves but three defendants if the rule is applicable here it could be applicable to a hundred defendants.

There would be no reason why the District Attorney, given this latitude in this case, could not thereafter charge ten defendants with ten separate conspiracies, or a hundred people with separate and distinct conspiracies and mass them all before the same jury.

In *Boyd v. United States,* 116 U.S. 616, the Court said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of a person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

And, in *Krulewitch v. United States,* 93 L. Ed. 623 at 631, that Court said:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence

> of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate."

Here the charge related to a single conspiracy—not separate conspiracies, separately stated against separate persons, as in the case at bar.

And, in *Kotteakos v. United States,* 328 U.S. 715, 90 L. Ed. 1557, the Court said at page 1571, of 90 L. Ed.:

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise are so great that no one really can say prejudice to substantial rights has not taken place."

In the present case, the State of California has permitted joinder, and construed and applied Section 954 and 1098 of the Penal Code to permit mass trial, and to permit joinder of separate defendants separately charged. It is for this Court, we respectfully submit, to determine in a hearing whether such procedure and whether such statutes, as construed and applied in this case, violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This Court has said in *Re Oliver,* 333 U.S. 278:

> "It is 'the law of the land' that no man's life, liberty or property be forfeited, as a punishment until there has been a charge *fairly* made and *fairly* tried in a public tribunal. See Chambers v. Florida, 309 U.S. 227, 236, 237, 84 L. Ed. 716, 721, 722, 60 S. Ct. 472. The petitioner was convicted without that kind of trial."

We submit that in the present case the petitioner was convicted without that kind of a trial, where he sat on an uneasy seat while seventy-five percent, or more, of damaging evidence was being submitted to a jury against other defendants. The great weight of that mass of testimony could not help but be prejudicial.

Due process of law does not envision a trial such as occurred in the case at bar. As Judge Van Devanter stated in the case of *United States v. Dietrich, et al.,* 126 F. 664, 671, after an exhaustive discussion of the joinder of parties, defendant and charger, both under common law and modern practice:

> "The general rule that two or more defendants cannot be severally charged in the same indictment with distinct and several offenses is well recognized * * *"
>
> "It is grounded in the right, always accorded a person accused of crime to a fair and impartial trial and to be convicted under proof of his own acts, unaffected by the atmosphere of guilt that may surround another defendant tried before the same jury for a different offense."

The defendant in California is entitled to jury trial on the issues of fact submitted to it. (California Constitution, Article I, Section 7.) A jury trial has been envisioned as a jury as constituted at common law. He is entitled to ten challenges. Where there are separate co-defendants joined in the same indictment, he must exercise some of his challenges jointly, and he has some left for individual challenge.

Such a trial as here occurred has never been allowed in the Courts of the United States.

In *McElroy v. United States,* 164 U.S. 76, 41 L. Ed. 355, the Supreme Court said:

> "The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence. **In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our States, to confine the indictment to one distinct offense or restrict the evidence to one transaction.** Young v. King, 3 T.R. 98, 106; Reg v. Heywood, Leigh & C. C. C., 451; Tindal C. J.

O'Connell v. Reg, 11 Clark & F. 241; Reg v. Ward, 10 Cox C. C. 42; Reg v. Lonsdale, 4 Fost. & F. 56; Goodhue v. People, 94 Ill. 37; State v. Nelson, 8 N.H. 165; People v. Aikin, 66 Mich. 470; Williams v. State, 77 Ala. 53; State v. Hutchings, 24 S.C. 142; State v. McNeill, 93 N.C. 552; State v. Daubert, 42 Mo. 242; 1 Bishop, Crim. Proc. § 259. Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is reversible on error."

Such a procedure as occurred herein has, except in the instant case, been universally criticized by the various state Courts including the First District Court of Appeal of California. That Court stated:

> "We have been cited to no case holding that the error in consolidating such indictments is not prejudicial."
>
> *Peo. v. Davis,* 42 Cal. App. (2d) 70, 108 P. (2d) 85.

See also

> *State v. Harkness,* 196 Washington 234, 82 P. (2d) 541.

While this Court has held that in Federal trials in Federal Courts such a procedure and proceeding would not be constitutionally allowed (see also *Pointer v. United States,* 151 U.S. 396), it has never passed upon the issue whether such mass trial is due process of law in any state of the United States of America.

We submit that such procedure must now be condemned at its inception, lest it encroach upon the con-

stitutional liberties of the citizens to be tried fairly in accordance with due process of law.

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## II.

**THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE TRIAL IN THIS CASE CONSTITUTED FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.**

While a state may adopt any procedure it wishes, it is governed by the provisions of the Fourteenth Amendment that, whatever its procedure is, it must result in *fair trial.* Otherwise, it offends due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

*Louisiana Ex Rel. Francis v. Resweber,* 329 U.S. 459, 91 L. Ed. 422;

*Lisenba v. California,* 314 U.S. 219, 86 L. Ed. 166;

*Snyder v. Massachusetts,* 291 U.S. 105, 78 L. Ed. 677;

*Holden v. Hardy,* 169 U.S. 366, 389;

*Twining v. New Jersey,* 211 U.S. 78, 53 L. Ed. 97;

*Adamson v. People of the State of California,* 332 U.S. 46, 91 L. Ed. 1903;

*Chambers v. Florida,* 309 U.S. 227, 242, 84 L. Ed. 716, 724;

*Malinsky v. New York,* 324 U. S. 401;

*Buchalter v. New York,* 319 U.S. 427, 429;

*Carter v. Illinois,* 329 U.S. 172.

As stated in *Carter v. Illinois,* 329 U.S. 172 at 175:

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Mooney v. Holohan, 294 U.S. 103, 79 L. Ed. 791, 98 A.L.R. 406. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record."

We recognize that a State may adopt its own form of criminal procedure. However, this is restricted by:

> "The constitution commands the State to assure fair judgment."

The state must:

> "observe those ultimate dignities of man which the United States Constitution assures. Brown v. New Jersey, 175 U.S. 172, 175, 44 L. Ed. 119; Missouri v. Lewis (Bowman v. Lewis), 101 U.S. 22, 31, 25 L. Ed. 989, 992."

However wide discretion is left to the state, it cannot use a procedure such as mass trials, which would be offensive to the very concept of justice which inheres in our institutions.

The intrinsic fairness of such a criminal process is involved in this case.

Even though an accused has counsel ever so skilled in the trial of a criminal case, such counsel cannot overcome the effect of mass trials of separate crimes, separately stated, all brought before the same jury.

Such proceeding cut the ground from under a clear defense in this case. Mere association or acquaintanceship, merely sitting in the courtroom with other co-defendants throughout a long trial, illegally insufficient, is a trifle light as air that so far as the jury is concerned becomes a magnitude of evidence solemn as the Holy Writ.

Can this be fair trial in the United States of America? The Attorney General of the State of California realizes that the question is fundamental. This Court is in this case called upon to decide it. The scope and magnitude is as fundamental as that in the Due Process question raised in *Adamson v. People of the State of California* (332 U.S. 46), in *Lisenba v. People of the State of California,* 314 U.S. 219, and *Chambers v. Florida,* 309 U.S. 227, and the other cases cited supra.

In *People v. Brower,* 207 Pac. (2d) 571, Mr. Justice Peters, quoting from *Bollenbach v. United States,* 326 U.S. 607, at page 614, says as follows:

> "The federal statute on the subject is substantially similar to Art. VI, § 4½. The leading case interpreting the federal statutes in Bollenbach v. United States, 326 U.S. 607, at page 614, 66 S. Ct. 402, 406, 90 L. Ed. 350, appears the following:
>
> 'In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise

from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal courts. * * *

'The "technical errors" against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. * * * From presuming too often all errors to be "prejudicial", the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.' (Emphasis added.) See, also, Bihn v. United States, 328 U.S. 633, 66 S. Ct. 1172, 90 L. Ed. 1485; Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557.

The rules announced in these cases have been violated by the majority opinion. Such a violation of defendant's constitutional rights cannot be justified on the ground that a majority of this court honestly believe that defendant is guilty. The point is that defendant has not been found guilty in the manner required by law. This defendant, under our law, is presumed innocent until found guilty by a jury after a fair trial. The right to a fair trial is as important as the right to a jury trial. It is not sufficient to substi-

tute for the constitutionally protected right to a fair trial the honest belief of a majority of an appellate court that the jury could, and probably would have convicted without the inadmissible evidence."

In *People v. Davis*, 42 Cal. App. (2d) 70 at 75, it is stated:

> "* * * every case that we have found involving a situation similar to that here presented has resulted in a reversal on the ground that error was prejudicial. (Brimie v. United States, 200 Fed. 726 [119 C.C.A. 170]; Coco v. United States, 289 Fed. 33; Callahan v. United States, 299 Fed. 72; Zedd v. United States, 11 Fed. (2d) 96; Castellins v. United States, 64 Fed. (2d) 636; Cutjak v. United States, 53 Fed. (2d) 554.) There is a good discussion of the various types of factual situations that may be presented in United States v. Ashe, 2 Fed. (2d) 735, 738."

In *Cole v. Arkansas*, 333 U.S. 196, 92 L. Ed. 644, at page 648, this Court said:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jong v. Oregon, 299 U.S. 353, 362, 81 L. Ed. 278, 282."

We respectfully assert that the petitioner, Mr. Ben Sugarman, was actually sent to prison on a trial upon charges of which he was not the accused and in which there was no evidence against him personally. That seventy-five percent of the evidence, or more, was against other defendants.

The result of such a proceeding was to deny the defendant a fair trial and a trial by jury under the constitutional sense, since it was impossible to segregate the evidence which the jury felt was unfavorable to Mr. Sugarman on charges not made against him from that against co-defendants against whom charges were made in the same indictment.

To permit such mass trials is "to hold that the petitioner had been denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law."

*Cole v. Arkansas,* 333 U.S. 202, 92 L. Ed. 648.

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## III.

**THE COURT SHOULD GRANT THE WRIT TO DETERMINE IF PETITIONER HAS BEEN DENIED THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

As this is the first case in which a citizen of the United States and of California has been singled out for invidious treatment to be tried on separate charges before the same jury en masse, the question is also presented whether such singling out and such invidious treatment constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This was presented to all of the California Courts by habeas corpus which is being brought up to this Court in conjunction with this case also, and said writ of habeas corpus was denied—Justices Jesse W. Carter and B. Rey Schauer of the Supreme Court of

the State of California voting for a hearing thereon. No opinion was rendered in the habeas corpus proceedings but the Attorney General of the State of California, the highest non-judicial officer of the state, stated that the questions were of fundamental importance and should be decided.

*Louisiana v. Resweber,* 329 U.S. 459;
*Hysler v. Florida,* 315 U.S. 411, 423;
*Yick Wo v. Hopkins,* 118 U.S. 356, 30 L. Ed. 220;
*American Sugar Refining Co. v. Louisiana,* 179 U.S. 89, 92, 45 L. Ed. 102;
*Kotch v. River Port Pilot Commissioners,* 330 U.S. 552, 557;
*Alston v. School Board,* 112 Fed. (2d) 992, 130 A.L.R. 1506;
*Burke v. New York,* 156 Fed. (2d) 791;
60 *Harvard Law Review* 271.

Wherefore, petitioner Ben Sugarman prays for a writ of certiorari to the District Court of Appeal, Third Appellate District, State of California, and for reversal of the judgment of the Court below denying him procedural due process of law guaranteed by the Fourteenth Amendment to the U. S. Constitution

and a fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Dated, Los Angeles, California,
September 21, 1949.

MORRIS LAVINE,
*Attorney for Petitioner.*

MAX WILLENS,
OF WILLENS AND BOSCOE,
*Of Counsel.*

MOTION

Comes now Ben Sugarman, the petitioner herein, and moves this Honorable Court to dispense with the printing of the record on appeal in this case. Both the Attorney General and the appellant have typewritten copies of the reporter's transcript, which covers the entire trial and which has been submitted to show the unfairness of the trial in this case. The record involves several typewritten transcripts, a certified copy of which has been filed with the clerk of this Court.

The appellant is now confined in the State Prison at San Quentin and asks leave of Court to dispense with the printing of the record and the enormous cost attached to the same.

Dated, Los Angeles, California,
September 21, 1949.

MORRIS LAVINE,
*Attorney for Petitioner.*

MAX WILLENS,
OF WILLENS AND BOSCOE,
*Of Counsel.*